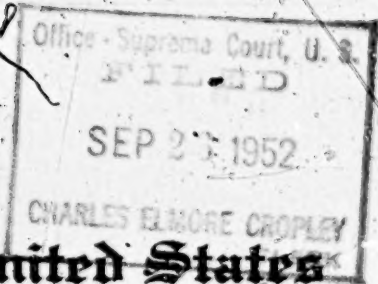


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SUPREME COURT, U. S.



**Supreme Court of the United States**

OCTOBER TERM 1952

**No. 341**

WILLIAM POULOS,

*Appellant*

v.

THE STATE OF NEW HAMPSHIRE

*Appellee*

APPEAL FROM THE SUPREME COURT  
OF THE STATE OF NEW HAMPSHIRE

**APPELLANT'S REPLY TO  
OPPOSITION TO JURISDICTION**

HAYDEN C. COVINGTON

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*Counsel for Appellant*

**SUPREME COURT OF THE UNITED STATES**

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**MAY IT PLEASE THE COURT:**

The statement made in opposition to jurisdiction by the appellee, if relied upon without scrutiny, will lead this Court to the erroneous conclusion that no federal question was presented by appellant in the state court or is involved

upon this appeal. While the jurisdictional statement is sufficient on these points, to lighten the labor of the Court and to help the Court avoid the confusion that the appeal is captured by, this reply is made.

## I

It is contended that no attack was made on the "unreasonableness of the action of the City Council". See page 1 of the statement by appellee. In order to rely on the constitutionality of the enforcement of the ordinance of Portsmouth policy to exclude religious meetings from the park, it was not necessary to add to the charge of a violation of the Federal Constitution that the enforcement was "unreasonable". The unreasonableness is implied in the charge that appellant's constitutional rights were violated by the City Council. Moreover, the sufficiency of the federal constitutional question is not dependent upon the word "unreasonable".

## II

The statement is made by the appellee that the effect of the denial of the motion to dismiss and to grant a judgment of acquittal is *limited* to the grounds that the denial of the permit was *arbitrary and capricious and that it was the duty of the City Council to issue the permit*. This statement is untrue. The motion in the trial court was not thus limited. The motion stated that the denial of the permit was an unconstitutional enforcement of the ordinance so as to abridge the rights of appellant, and that the appellant was convicted by the court under the ordinance he would be denied his rights of freedom of assembly, speech and worship contrary to the First and Fourteenth Amendments to the United States Constitution. Except for the question taken to the denial of this motion. The constitutional question presented in the trial court was also raised by the exception in the Supreme Court. The description of

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unconstitutional action by the City Council as "arbitrary and capricious" did not limit or nullify the federal question presented that the construction, application and enforcement of the ordinance violated the rights of appellant contrary to the First and Fourteenth Amendments.

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### III

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Much is made by appellee over the failure of the court to discuss the federal question in its opinion, and the failure of the appellant to get a certificate from the Supreme Court of New Hampshire that it determined the federal question. While it is true that a discussion of the federal question in the opinion or the certificate would help the appellant to stop the mouth of appellee on the determination of the question, neither of those elements is a prerequisite to the presence of the federal question. The question was actually and properly raised in the record. The New Hampshire courts evaded the question by ignoring the federal grounds raised in the motion, and by considering the motion and the exception as though the only point raised was the state question of 'arbitrariness and capriciousness'. The ignoring of the point of the motion raising the federal question was patently an evasion of the question. The courts below were not permitted to consider only the state question raised in the motion and to ignore the federal question. It was arbitrary, capricious, and a violation of the Federal Constitution for the courts below to resort to the trick of erasing the federal question from the motion. They should have taken the motion in its entirety, as was done in *State v. Cox*, 91 N. H. 137, affirmed *Cox v. New Hampshire*, 312 U. S. 569, rather than indulge in legerdemain.

It is, therefore, obvious that the failure to discuss the federal question in the opinion, as the court did in the *Cox* case, was not due to the question's not being raised. But it is apparent that the failure to discuss the question is

a subterfuge to shun and illegally elude the responsibility properly placed on the courts by the appellant in this case.

Since it is clear that there has been an illegal evasion of the properly presented federal question, under the pretext that only a state question is involved, it is neither necessary nor advisable that this Court wait for the appellant to obtain a certificate from the Supreme Court of New Hampshire.

If the right to get a determination of a properly raised federal question, necessary to a decision of a case, is made to depend upon a discussion of the federal question in the opinion or upon the procurement of a certificate, then the constitutional rights of appellants in federal cases pending in state courts would depend exclusively upon the mercy of the state courts. The jurisdiction of this Court is not so easily evaded.

#### IV

It should not be overlooked that appellant contended in the state courts and now urges that the construction of the ordinance, so as to deny the right to challenge the constitutionality of the ordinance as applied in this criminal case, and the holding limiting the defense to mandamus or certiorari, itself constitutes a burden upon freedom of assembly, speech and worship contrary to the Constitution. The state question of procedure in this case itself constitutes a burden on rights guaranteed by the First Amendment to the Federal Constitution. This question, therefore, is properly before this Court.

This Court should notice that the courts below did not expressly hold that the defense of unconstitutionality as applied could not be considered. By silence and the refusal to consider the point, properly raised in the motion, the courts below implicitly held that the unconstitutionality of



the ordinance as construed and applied could not be considered.

## V

It is erroneously stated by the appellee that the determination of the validity of the ordinance by the Supreme Court of New Hampshire in its first opinion did not go out of bounds of the decision in *Cox v. New Hampshire*, 312 U. S. 569, affirming *State v. Cox*, 91 N. H. 137. The opinion on certified question transferred by reserved case to the Supreme Court of New Hampshire by the Superior Court of New Hampshire does go beyond the *Cox* decision. The Supreme Court illegally grafted onto the ordinance the theory that the Council had zoned the parks, so as to permit religious meetings in some parks and deny them in others, including Goodwin Park where appellant spoke. The ordinance, as construed, applied and enforced was held not to be an unconstitutional violation of appellant's rights for the reason of zoning. This theory of zoning was proved to be false, a figment of the imagination of the Supreme Court of New Hampshire, and a pretext not backed up by the facts. It was not supported by the stipulated facts in the reserved case. The denial of the permit by the City Council was for only one reason. That was the policy of the City of Portsmouth not to grant permits for religious meetings in the parks of the city. The courts of New Hampshire have approved the construction, enforcement, and application of the ordinance by the City Council over the objection of appellant, properly raised, that his rights guaranteed by the First and Fourteenth Amendments have been violated.

WHEREFORE, for the reasons above stated and for

substantial grounds shown in the jurisdictional state-  
ment, jurisdiction in this case ought to be noted.

Respectfully,

HAYDEN C. COVINGTON

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*Attorney for Appellant*